IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 330

GOLDBLATT BROS., INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

NICHOLAS J. PRITZKER,
STANFORD CLINTON,
134 N. La Salle St., Chicago, Ill.,
Attorneys for Petitioner.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0562

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Goldblatt Bros., Inc., respectfully prays the issuance of a writ of certiorari to review the judgment in the United States Circuit Court of Appeals for the Seventh Circuit entered on May 23, 1942 affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

OPINIONS BELOW.

The District Court filed no opinion. The opinions in the Circuit Court of Appeals (R. 208-215) are reported at 128 F. (2d) 576.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 23, 1942 (R. 216). A petition for re-hearing was denied June 16, 1942 (R. 217). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. In a suit under the Bulk Sales Law of Illinois (Ill. Rev. Stat. 1941, Ch. 121½, Sec. 78 *et seq.*) against a bulk sales vendee are federal income and social security tax returns filed by the bulk sales vendor admissible to show the existence and the amount of the taxes claimed against the bulk sales vendor, where it appears that the tax returns were filed subsequent to the consummation of the bulk sale and at a time when the bulk sales vendor had no assets and was no longer engaged in business?

2. Within the meaning of the Bulk Sales Law of Illinois (Ill. Rev. Stat. 1941, Ch. 121½, Sec. 78 *et seq.*) is respondent a creditor for income and Title IX social security taxes prior to the expiration of the taxable year during which such taxes are regularly assessable and which, in fact, have not been assessed?

STATUTES INVOLVED.

The pertinent statutes are set forth in the Appendix.

STATEMENT.

The petitioner is the owner of ten department stores located in Chicago and vicinity. Prior to November 22, 1937 the New Dahl Corporation operated shoe repair concessions in petitioner's stores (R. 18). The relationship between the petitioner and New Dahl was solely that of lessor and lessee, the petitioner having no control or authority over the conduct and operation of New Dahl's business (R. 24, 34, 38, 98-9). For some time prior to November 22, 1937 New Dahl experienced severe financial difficulties (R. 89-92). Norman Dahlman, president of New Dahl, who, together with members of his immediate family, owned all of New Dahl's stock (R. 24, 34-5), offered to sell the business to petitioner (R. 93). The offer was at first refused (R. 94), but after the payroll checks of New Dahl's employees were dishonored for payment (R. 19, 107) petitioner undertook to purchase all of New Dahl's assets, with the exception of certain uncollectible accounts receivable, in conformity with the provisions of the Bulk Sales Law of Illinois. (Ill. Rev. Stat. 1941, Ch. 121½, Sec. 78 *et seq.*) (R. 33-44, 53, 97, 98, 139-41.)

In fine, the Illinois Bulk Sales Act declares bulk sales other than in the ordinary course of trade fraudulent and void as against creditors of the vendor unless the vendee, at least five days before the consummation of the sale, procures in good faith from the vendor a sworn statement containing a full, accurate and complete list of the vendor's creditors, their addresses and the amounts owing to each as nearly as may be ascertained, or, in the event there are no creditors, a sworn statement to that effect. The Act further requires the vendee to send a notice in writing notifying each of the creditors listed in the sworn state-

ment or of whom the vendee has knowledge, of the proposed purchase. Failure to comply with the requirements of the Act makes the vendee liable to the claims of the vendor's creditors.

The contract of sale between petitioner and New Dahl was entered into on November 17, 1937 (R. 52). Paragraph 3 of the contract (R. 53) specified "* * * that the parties hereto will comply in all respects with the terms and conditions of the Bulk Sales Law of the State of Illinois. * * *" Contemporaneously with the execution of the contract, Norman Dahlman, as president and duly authorized agent of New Dahl, executed a bulk sales affidavit (R. 53) stating "* * * that the attached schedule is a full, accurate and complete list of all of the creditors of the said New Dahl Corporation * * *" and that the affidavit was made "* * * in compliance with the Bulk Sales Law of the State of Illinois and for the purpose of inducing Goldblatt Bros., Inc. to consummate a purchase of the assets of said New Dahl Corporation.'"[1] There was appended to the affidavit (R. 54-55) a list of creditors. Notices required by the Act were duly transmitted to these creditors (R. 52, 56) and petitioner made aggregate payments of $29,676.75 in full discharge of the claims listed in the bulk sales affidavit (R. 56). Respondent was not included in the list of creditors.

Respondent brought this suit against petitioner on the theory that respondent was a creditor of New Dahl within the meaning of the Bulk Sales Law of Illinois and that petitioner had knowledge of that fact, and that even though respondent was not included in the list of creditors attached to the bulk sales affidavit, petitioner had not com-

[1] This sworn statement was, of course, false. It is to be noted that Dahlman directed the preparation of the tax returns (R. 115) and actually gave oath as to the accuracy of the 1937 income tax return (R. 186).

plied with the requirements of the Illinois Bulk Sales Act in failing to serve notice of the bulk sales transaction upon the respondent and was therefore liable for respondent's claims against New Dahl (R. 4, 45-47).

Petitioner's answer placed in issue respondent's allegation that it was a New Dahl creditor and petitioner's compliance with the Illinois Bulk Sales Law, including the question of petitioner's knowledge that respondent was a creditor of New Dahl on the date of the bulk sales transaction (R. 7). The issues were resolved by the District Court adversely to the petitioner. Judgment was entered in the aggregate amount of $4,983.14, which may be broken down as follows:

1936	Income taxes, balance due on the principal amount of	$ 717.58
	Plus accrued interest thereon to the date of payment hereof in the amount of	149.74
	making a total of	867.37
1937	Income taxes, principal amount of	1,311.79
	Plus accrued interest thereon to the date hereof in the amount of	239.82
	making a total of	1,551.61
Nov. 1937	Social Security taxes, Title VIII in the principal amount of	39.30
	Plus accrued interest thereon in the amount of	7.70
	making a total of	47.00
Year 1936	Social Security taxes under Title IX, in the principal amount of	373.07
	Plus accrued interest thereon	80.73
	making a total of	453.80
Year 1937	Social Security taxes, under Title IX, in the principal amount of	1,733.58
	Plus accrued interest thereon in the amount of	329.78
	making a total of	2,063.36

The judgment was affirmed in its entirety by the Circuit Court of Appeals, one Judge dissenting as to petitioner's liability for New Dahl's 1937 income taxes and 1937 Title IX social security taxes (R. 208-215).

Petitioner, while remaining respectfully unreconciled to the adjudication that it had knowledge of respondent's claims against New Dahl prior to the bulk sale, accepts that finding of fact and all other findings of fact made below (R. 188) and confines this request for certiorari exclusively to the two questions of law heretofore specified. In consequence, the scope of the review applied for is limited to:

1. The admissibility of the evidence accepted by the trial court, over petitioner's seasonable objections (R. 48-50, 141), of the existence and amount of respondent's claims against New Dahl for 1937 income and Title IX social security taxes; and
2. Whether the courts below correctly concluded that respondent was a creditor for these taxes within the meaning of the Bulk Sales Law of Illinois.

The proof of New Dahl's alleged indebtedness for 1937 Title IX social security taxes and 1937 income taxes consists solely of the returns filed by New Dahl (R. 141-46, 175-186). These returns were filed only after a request by an internal revenue agent upon Norman Dahlman, the New Dahl president (R. 115). The delinquent return for the 1937 Title IX social security taxes was merely signed "New Dahl Corporation" and was filed on April 12, 1938, more than four months after the consummation of the bulk sales transaction (R. 144). This return was prepared by an internal revenue agent from "a sheet with figures on it" furnished by Hallquist (R. 116), a former New Dahl employee (R. 58). The source of these figures does

not appear. The 1937 income tax return was executed by Dahlman and was filed on March 10, 1938, more than three months after the consummation of the bulk sales transaction (R. 176). The source of the amounts reported does not appear. The New Dahl books and records were not accounted for upon the trial of the case. Dahlman testified that "the last knowledge" that he had as to the New Dahl books was that he had left them with the petitioner (R. 20). This testimony was disputed not only by petitioner's witnesses, but by respondent's witness Hallquist, who testified he saw the books at the Crest Shoe Repair Company, also a Dahlman enterprise, several months after the bulk sales transaction had been consummated (R. 60-61, 69-70, 74-5, 85, 88, 135, 138). During the investigation of the New Dahl tax liabilities shortly prior to the time the tax returns were filed, Dahlman told the internal revenue agent that the petitioner was going to pay the taxes in question (R. 113-14). It is conceded that from and after the time of the bulk sales transaction the New Dahl Corporation had no assets of value (R. 22, 72, 92-3, 104, 188).

The issue as to whether or not respondent was a creditor on the date of the bulk sales transaction within the meaning of the Bulk Sales Act of Illinois is resolved by considering the meaning of that statute as adjudicated by the courts of Illinois.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The admission of the 1937 tax returns to establish respondent as a New Dahl creditor for 1937 taxes was an important and unprecedented evidentiary ruling probably in conflict with the applicable Illinois decisions. *Illman* v. *Kruse,* 301 Ill. 408; *Delfosse* v. *Delfosse,* 287 Ill. 251.

New Dahl's "admission" that it owed taxes was simply the "admission" by one having no interest or concern in the effect of the admission. In the first place, at the time of the returns New Dahl had no assets (R. 22, 72, 90-93, 104, 188). It did not matter one whit to New Dahl whether it admitted tax liabilities of $1,000.00 or $1,000,000.00, nor did it matter in the least to New Dahl whether it claimed the benefit of various deductions which the law allows to taxpayers. New Dahl's only concern was to satisfy the demands of a revenue agent that the formality of filing a return be complied with (R. 115). As a matter of fact, New Dahl contended petitioner was liable for the taxes claimed (R. 113) although the contract specifically limited petitioner's liability to the obligation listed in the bulk sales contract (R. 52). In any event, New Dahl had no assets and was out of business (R. 22, 72, 90-93, 104, 188) and its tax liabilities, of whatever amount, were uncollectible. Obviously the same force and effect cannot and should not be given to an "admission" by a taxpayer who expects to pay the tax reported and an "admission" made in the belief that the liability for the tax will fall upon someone else.

Reliance by the majority of the Circuit Court of Appeals upon *Tameling* v. *Commissioner*, 43 F. (2d) 814-816 (R. 210) is insupportable. As pointed out in the dissenting opinion (R. 215), this case merely stands for the proposition that a taxpayer's own return can be used as an admission against him. It is a somewhat different thing to say that a tax return which in actuality admits nothing and means nothing to the person making out the return can be binding upon a third party long after the dealings between the person executing the return and the third party have completely terminated. In a controversy between the Commissioner and the tax-

payer it is not too much to ask the taxpayer to overcome the prima facie case made out by his own tax returns. However, the consequence in the case at bar of binding the petitioner to tax returns filed by a party totally disinterested in their effect was to impose upon the petitioner a burden of proof which was properly respondent's. The theory of the majority of the Circuit Court of Appeals that the returns were admissible to establish the primary liability of New Dahl and not the primary liability of the petitioner (R. 210) is untenable. This was a suit not against New Dahl but a suit against the petitioner. The admissibility of these returns should have been determined not by the rules of evidence applicable to New Dahl, but the rules of evidence applicable to the petitioner.

2. The conclusion of the majority of the Circuit Court of Appeals that the respondent was a creditor for 1937 income and Title IX social security taxes is clearly in conflict with the applicable local decisions of the State of Illinois. It is significant and vital to emphasize that although respondent's claims are for federal taxes, its right of recovery depends solely upon the law of Illinois. Federal authority here is limited to establishing the kind and amount of tax liability, if any, for which New Dahl was indebted. The respondent does not and cannot as against the petitioner, a purchaser for value, contend for any special preference or priority by virtue of its sovereignty but is confined solely to those rights and remedies of a creditor which the law of Illinois grants to private citizens (R. 4, 47). And it is only to state a corollary principle of the statutory nature of respondent's claims when we observe that in the absence of the Illinois Bulk Sales Act, respondent would have no theory of recovery as against the petitioner.

Recovery as against bulk sales vendees was unknown to the common law and in order for respondent to recover against petitioner it is well settled under the Illinois authorities that respondent's claims as of November 17, 1937, the date of the bulk sales transaction, were required to be liquidated, certain, due and owing. *Knass* v. *Madison & Kedzie State Bank*, 269 Ill. App. 588; *Coon* v. *Doss*, 361 Ill. 515; *Tipsworth* v. *Doss*, 273 Ill. App. 1; *Leonard Sash & Door Co.* v. *West Side Trust & Savings Bank*, 207 Ill. App. 3; *Smead Co.* v. *J. Oliver Johnson, Inc.*, 262 Ill. App. 385; *Superior Plating Works* v. *Art Metal Crafts Co.*, 218 Ill. App. 148; *Stony Island Trust & Savings Bank* v. *Stony Island State Savings Bank*, 240 Ill. App. 195.

On November 17, 1937 New Dahl's liability for 1937 income taxes was speculative and contingent: The taxable period was incomplete by forty-four days. The incidence of taxation fell not on a period consisting of ten months and seventeen days, but upon a period consisting of an entire calendar year. It was impossible for anyone to have forecast New Dahl's income tax liability for the year 1937 on November 17th of that year any more than it is possible for any citizen to now forecast his tax liability during the year 1942 when, as of the date of the writing of this petition, the applicable income tax laws have not been enacted. No one on November 17, 1937 could have foretold or anticipated New Dahl's business activities for the remainder of that year. So far as anything in the bulk sales agreement (R. 52) was concerned, New Dahl, which had retained its corporate identity, was free to undertake new business activities immediately after the bulk sale. That this did not happen, as we now know, is not in point. What does control is the fact that it could have happened and if it did, New Dahl's income tax liability for the year 1937 might, on the one hand, have been greatly increased, or,

on the other hand, reduced or entirely extinguished. Not only was the claim for 1937 income taxes contingent and speculative, but this claim was not due and owing on November 17, 1937. A taxpayer whose taxable year is equivalent to the calendar year is not required to file a return or pay any part of his tax liability until the 15th of March following the close of the calendar year for which the tax is assessable (26 U. S. C. A., Secs. 53 (a) and 56 (a)). While there are provisions in the Revenue Law for the acceleration of tax liability by jeopardy assessment (26 U. S. C. A., Sec. 146), this statutory power was not exercised in the instant case.

Likewise an examination of the relevant portions of the statutory provisions governing Title IX social security taxes (42 U. S. C. A., Sec. 1105) set forth in the Appendix clearly reflects that these taxes were not due until January 31st or more than two months subsequent to the consummation of the bulk sales transaction.

As pointed out in the dissenting opinion (R. 213), the majority of the Circuit Court of Appeals misconstrued and misapplied the Illinois Bulk Sales Act to the case at bar. There is not a single decided authority in Illinois which lends any support to the conclusion of the Court.

Winthrop v. *Kournetas,* 265 Ill. App. 535, cited in the majority opinion, involved a creditor who had reduced his claim to judgment prior to the date of the bulk sales transaction there involved. This case is clearly consistent with the proposition that claims to be recognized under the Illinois Bulk Sales Law must be owing, certain and liquidated as of the date of the consummation of the bulk sale.

CONCLUSION.

The importance of the questions here raised cannot be exaggerated. If a bulk sales vendee is required to assume risks as to taxes unassessed and not due and payable, regardless of a sworn bulk sales affidavit to the effect that no such liabilities exist, the amount of which taxes is speculative and limited only to the restraint and caution with which a disinterested bulk sales vendor subsequently prepares his tax returns, the result will be that all bulk sales transactions must be delayed and held in abeyance for a five-day period after notice to the federal taxing officials. Such delays and hindrances in the commercial life of the community are not contemplated or intended by the Bulk Sales Act of Illinois.

We respectfully submit that this petition for a writ of certiorari should be granted.

NICHOLAS J. PRITZKER,
STANFORD CLINTON,
Attorneys for Petitioner.

August, 1942.

APPENDIX.

1. The pertinent provisions of the Bulk Sales Act of Illinois (Ill. Rev. Stat. 1941, Ch. 121½, Sec. 78 *et seq.*) are:

SEC. 78. That the sale, transfer, or assignment in bulk of the major part or the whole of a stock of merchandise, or merchandise and fixtures or other goods and chattels of the vendor's business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the vendor's business shall be fraudulent and void as against the creditors of the said vendor, unless the said vendee shall, in good faith, at least five (5) days before the consummation of such sale, transfer or assignment demand and receive from the vendor a written statement under oath of the vendor or a duly authorized agent of the vendor having knowledge of the facts, containing a full, accurate and complete list of the creditors of the vendor, their addresses and the amounts owing to each as near as may be ascertained, and if there be no creditors, a written statement under oath to that effect; and unless the said vendee shall at least five days before taking possession of said goods and chattels and at least five days before the payment or delivery of the purchase price, or consideration of (or) any evidence of indebtedness therefor, in good faith, deliver or cause to be delivered or send or cause to be sent personally or by registered letter properly stamped, directed and addressed, a notice in writing to each of the creditors of the vendor named in the said statement or of whom the said vendee shall have knowledge, of the proposed purchase by him of the said goods and chattels and of the price, terms and conditions of such sale: Provided, however, that it shall be lawful for the vendee to pay to the vendor so much of the purchase price as shall be in excess of the total amount of the indebtedness of the vendor, before the expiration of the five days hereinbefore referred to.

SEC. 80-a. Any creditor or creditors of the vendor of any stock of merchandise, merchandise and fixtures, or other goods and chattels of the vendor's

business made in violation of the provisions of this Act, may pursue his remedy either at law or in equity, against either the vendor or vendors, the purchaser or purchasers, jointly or severally, or against the whole or any part of such stock of merchandise, merchandise and fixtures, or other goods and chattels, by a suit either at law or in equity, without having reduced his claim to judgment; and the court in which said suit is pending shall have jurisdiction to adjust the rights and equities of all parties having an interest in the property in such proceedings.

2. The pertinent provisions of the Revenue Laws are as follows:

26 U. S. C. A.

Sec. 53 Time and place for filing returns

(a) Time for filing

(1) General rule. Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year.

26 U. S. C. A.

Sec. 56 Payment of tax

(a) Time of payment. The total amount of tax imposed by this chapter shall be paid on the fifteenth day of March following the close of the calendar year.

26 U. S. C. A.

Sec. 146 Closing by commissioner of taxable year

(a) Tax in jeopardy

(1) Departure of taxpayer or removal of property from United States. If the Commissioner finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the tax for the taxable year then last past or the taxable year then current

unless such proceedings be brought without delay, the Commissioner shall declare the taxable period for such taxpayer immediately terminated and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; *and such taxes shall thereupon become immediately due and payable.* (Italics ours.)

3. The pertinent provisions of the Social Security Act are as follows:

42 U. S. C. A.
Sec. 1105

(a) The tax imposed by Section 1101 of this Chapter (such tax being the tax imposed by employers having employees of eight or more) shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury and shall be paid into the Treasury of the United States as Internal Revenue collections. *If the tax is not paid when due,* there shall be added, as part of the tax, interest at the rate of ½ of one per centum per month *from the date the tax became due until paid.* (Italics ours.)

(b) Not later than January 31st next following the close of the taxable year, each employer shall make a return of the tax under Sections 1101 to 1110 of this Chapter, for such taxable year.

(d) The taxpayer may elect to pay in four equal installments instead of in a single payment, in which case the first installment shall be paid not later than the last date prescribed for the filing of returns.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 330

GOLDBLATT BROS., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. It made findings of fact and conclusions of law. (R. 188–191.) The opinion of the Circuit Court of Appeals for the Seventh Circuit and the dissenting opinion (R. 208–215) are reported in 128 F. (2d) 576.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 23, 1942. (R. 216.) A petition for rehearing was denied June 16, 1942. (R. 217.)

Petition for certiorari was filed August 22, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. In a proceeding under the Illinois Bulk Sales Act against the bulk sales vendee to collect unpaid income and social security taxes of the vendor, did the trial court err in admitting in evidence the tax returns prepared and filed by the vendor?

2. Where the bulk sale took place in November, 1937, was the United States a creditor of the vendor with respect to 1937 income and social security taxes which had not then been assessed?

STATUTE INVOLVED

Illinois Bulk Sales Act (approved May 3, 1913, p. 258), Illinois Revised Statutes (1935), c. 121a:

> PAR. 1. *Sale, transfer or assignment in bulk of major part or whole of goods and chattels of vendor's business—When fraudulent and void as to creditors—Statement of vendor's liabilities—Notice by vendee to vendor's creditors—Payment of excess over indebtedness.*—Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That the sale, transfer, or assignment in bulk of the major part or the whole of a stock of merchandise, or merchandise and fixtures or other goods and chattels of the vendor's business, otherwise than in the ordinary

course of trade and in the regular and usual prosecution of the vendor's business shall be fraudulent and void as against the creditors of the said vendor, unless the said vendee shall, in good faith, at least five (5) days before the consummation of such sale, transfer or assignment demand and receive from the vendor a written statement under oath of the vendor or a duly authorized agent of the vendor having knowledge of the facts, containing a full, accurate and complete list of the creditors of the vendor, their addresses and the amounts owing to each as near as may be ascertained, and if there be no creditors, a written statement under oath to that effect; and unless the said vendee shall at least five days before taking possession of said goods and chattels and at least five days before the payment or delivery of the purchase price, or consideration of any evidence of indebtedness therefor, in good faith, deliver or cause to be delivered or send or cause to be sent personally or by registered letter properly stamped, directed and addressed, a notice in writing to each of the creditors of the vendor named in the said statement or of whom the said vendee shall have knowledge, of the proposed purchase by him of the said goods and chattels and of the price, terms and conditions of such sale: *Provided, however,* that it shall be lawful for the vendee to pay to the vendor so much of the purchase price as shall be in excess of the total amount of the indebtedness of the

vendor, before the expiration of the five days hereinabove referred to.

* * * * *

PAR. 3 (1). *Creditor may prosecute action at law or in equity—Judgment not prerequisite.* Sec. 4. Any creditor or creditors of the vendor of any stock of merchandise, merchandise and fixtures, or other goods and chattels of the vendor's business made in violation of the provisions of this Act, may pursue his remedy either at law or in equity, against either the vendor or vendors, the purchaser or purchasers, jointly or severally, or against the whole or any part of such stock of merchandise, merchandise and fixtures, or other goods and chattels, by a suit either at law or in equity, without having reduced his claim to judgment; and the court in which said suit is pending shall have jurisdiction to adjust the rights and equities of all parties having an interest in the property in such proceedings.

STATEMENT

The United States brought this action against petitioner pursuant to the Illinois Bulk Sales Act to recover income and Social Security taxes for the years 1936 and 1937. As found by the district court, a jury having been waived (R. 45), the essential facts are the following:

On November 17, 1937, petitioner, an Illinois corporation, purchased from the New Dahl Corporation, an Illinois corporation (hereinafter

called New Dahl), the bulk of the assets of the latter; the purchase and sale was not in the regular course of business of New Dahl. (R. 188.)

New Dahl, through its president, Norman Dahlman, executed and delivered to petitioner a list of creditors of New Dahl as of the date of the sale. The list did not contain the name of the United States or any of its agents. (R. 188.)

After the sale, New Dahl ceased to engage in any business activities, and petitioner, through its agents, Henry Applebaum and Samuel Tronsky, knew at the time of the sale that New Dahl would so cease upon the consummation of the sale. (R. 189.)

On the date of the sale, New Dahl was indebted to the United States of America on account of the following tax liabilities (R. 189):

Year	
1936 Income Tax	$717.58
1936 Social Security Taxes—Title IX	373.07
Nov.	
1937 Social Security Taxes—Title VIII	78.74
1937 Income Taxes	1,311.79
1937 Social Security Taxes—Title IX	1,733.58

On December 31, 1937, petitioner paid $39.44 to the Collector of Internal Revenue for the First Collection District of Illinois on account of the liability of the New Dahl Corporation for social security taxes under Title VIII of that Act for the month of November 1937, leaving a balance due on that item of tax liability in the amount of $39.30. (R. 189.)

Notice of the sale was sent by petitioner to the creditors of New Dahl named in the list of creditors, but no such notice was ever sent to the United States or to any of its agents. (R. 189.)

On the date of the sale, Henry Applebaum was one of the vice presidents and Samuel Tronsky was assistant secretary and comptroller of petitioner, and both were its officers and agents at the time of the sale, and at all times during which negotiations were had between it and New Dahl, which negotiations led to the consummation of the sale. (R. 189.) Henry Applebaum and Samuel Tronsky both had knowledge, individually and as officers and agents of petitioner, of the existence of the United States as a creditor of New Dahl for the tax liabilities aforesaid at the time the sale was consummated and during the time negotiations leading up to the consummation of the sale were had between petitioner and New Dahl. (R. 189–190.) Henry Applebaum was a duly authorized agent of Goldblatt Bros., Inc., to negotiate and effect the consummation of the sale. (R. 190.)

Upon these findings the District Court concluded (R. 190–191) that the tax liabilities of New Dahl were duly assessed; that the United States was, to that extent, a creditor at the time of the bulk sale; that petitioner had knowledge of such creditor relationship at and prior to the sale; and that by reason of the purchaser's failure to notify the United States of the sale the purchaser was liable under the Illinois Bulk Sales Act to the United

States for the seller's unpaid taxes. Judgment was entered for $4,983.14, with interest. (R. 192.) The Circuit Court of Appeals affirmed. (R. 216.)

ARGUMENT

1. The first ground asserted by the petitioner (Pet. 7) for the issuance of the writ relates to the admission in evidence of the 1937 tax returns prepared and filed by the bulk sales vendor. In the first place, it should be pointed out that the trial court did not rely on the returns. It reached the conclusion that the basic liability was established by the assessments. (R. 190.) It was stipulated (R. 50) that all of the basic tax liabilities of the vendor were duly and timely assessed by the Commissioner of Internal Revenue, and the trial court concluded that the United States was a creditor to the extent of such assessments. (R. 190.) Assessments alone are ordinarily sufficient to establish a *prima facie* case as to the basic tax liabilities. See *United States* v. *Rindskopf,* 105 U. S. 418; *Tameling* v. *Commissioner,* 43 F. (2d) 814 (C. C. A. 2d). It is noteworthy that Congress has provided, with respect to transferee proceedings before the Board of Tax Appeals, that the burden on the issue of the taxpayer's liability for the tax, as distinguished from the petitioner's liability as a transferee, is on the petitioner. Revenue Act of 1928, c. 852, 45 Stat. 791, sec. 602, I. R. C., sec. 1119(a). In the instant case, the evidentiary issue relates to the taxpayer's

liability; petitioner's obligation rests on the Illinois Bulk Sales Act. Clearly there is no federal policy which would weaken the evidentiary value of the Commissioner's determination here. No Illinois cases cited indicate a different local rule.

Even if it be assumed that the establishment of the liability depends upon the admission of the 1937 tax returns, petitioner's case is no stronger. The 1937 returns, though made after the bulk sale, constituted a declaration against interest and so had genuine probative value.[1] The cases cited by petitioner (Pet. 7) are plainly irrevelant. Both *Illman* v. *Kruse,* 301 Ill. 408, and *Delfosse* v. *Delfosse,* 287 Ill. 251, simply held that declarations were inadmissible to contradict the terms of a deed.

2. The petitioner further asserts (Pet. 9) that even if the basic tax liability of the vendor was sufficiently established, the United States was not a creditor for the 1937 income and social security taxes within the meaning of the Illinois Bulk Sales Act.

In the present posture of the case, petitioner accepts the decision so far as it concerns the 1936 tax liabilities. It follows that the United States was a creditor and entitled to notice under the Illinois Bulk Sales Act. If such notice had been given, there would have been an opportunity to

[1] By the terms of the sale the vendor retained the accounts receivable from its officers (R. 9; see R. 43), which would be available under the Illinois Bulk Sales Act, or otherwise, for the satisfaction of tax liabilities of the vendor.

make the jeopardy assessment referred to by petitioner (Pet. 11) with respect to the 1937 taxes. Thus, the question presented is the narrow one whether a creditor entitled to notice under the Act may pursue its remedies with respect to a claim that could have been fully liquidated by act of the creditor had the notice been given. Neither the terms of the Act nor the authorities cited by petitioner conflict with the decision below on this question.

The statute itself provides for the listing of "the amounts owing to each [creditor] as near as may be ascertained". The amount of the social security tax could have been exactly determined on the date of the sale since it was merely based upon a percentage of the vendor's payroll. In the case of the income tax, even apart from the possibility of a jeopardy assessment, the very nature of the bulk sale made it most unlikely that the vendor would transact any further business which might affect its income tax liability in the remaining period of less than two months, and hence a reasonable approximation of the liability could have been computed.

The cases cited by the petitioner (Pet. 10) are clearly distinguishable. *Knass* v. *Madison & Kedzie State Bank*, 269 Ill. App. 588, and *Tipsword* v. *Doss*, 273 Ill. App. 1, dealt with the applicability of the statute to the transfer of bank assets and the sale of farming equipment, respectively. *Coon* v. *Doss*, 361 Ill. 515, held that the statute does not cover the assignee of a note acquired almost four years after the bulk sale. *Smead Co., Inc.* v. *J.*

Oliver Johnson, Inc., 262 Ill. App. 385; *Stony Island Trust & Savings Bank* v. *Stony Island State Savings Bank*, 240 Ill. App. 195, and *Superior Plating Works* v. *Art Metal Crafts Co.*, 218 Ill. App. 148, stand for the rule that the statute is inapplicable to persons holding contingent claims for damages in tort, or damages for breach of contract which depend on the difference between contract and market price. *Lawndale Sash and Door Company* v. *West Side Trust & Savings Bank*, 207 Ill. App. 3, ruled that a lessor could not be considered a creditor at the time of a bulk sale if all rent due to date under the lease had been paid. At most the local decisions leave the application of the statute in doubt. There is no occasion to disturb the considered decision of the court below.

CONCLUSION

There is no error in the decision below, or a conflict of authorities. The petition should be denied.

Respectfully submitted,

CHARLES FAHY
Solicitor General
SAMUEL O. CLARK, Jr.
Assistant Attorney General
SEWALL KEY
J. LOUIS MONARCH
JOSEPH M. JONES
Special Assistants to the Attorney General

SEPTEMBER 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

Original Action No. .....

IN THE

Supreme Court of the United States

October Term, 1942

No. .....

MARTIN M. GOLDMAN and JACOB P. SHULMAN,
Petitioners,

against

SIDNEY C. MIZE, United States District Judge for the Southern District of Mississippi,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, PETITION FOR WRIT OF MANDAMUS AND BRIEF IN SUPPORT THEREOF

JACOB W. FRIEDMAN,
Attorney for Petitioners,
170 Broadway,
New York, N. Y.

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SIDNEY C. MIZE, United States District Judge for the Southern District of Mississippi,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioners, by this motion, ask leave to file in this Court the annexed petition seeking a writ of mandamus to compel the respondent, United States District Judge for the Southern District of Mississippi, to assume jurisdiction on the merits of an application heretofore made to him by your petitioners for a reargument, rehearing and reconsideration of his order and ruling made in New York on July 26th, 1940, then denying their motion

for a suspension of the execution of a sentence of imprisonment and for their admission to probation. The said application was denied by respondent at Jackson, Mississippi, on or about January 26th, 1943, by order filed in the Southern District of New York on or about January 29th, 1943, which denial was expressly predicated upon lack of jurisdiction in the respondent by reason of his absence from the Southern District of New York and the expiration of his designation for that District.

Motion for leave to file the annexed petition is based upon the supervisory authority of this Court to issue writs of mandamus to the district courts of the United States in cases warranted by the principles and usages of law, in accordance with United States Code, Title 28, Sec. 342 (Judicial Code, Sec. 234).

This motion is made and the petition annexed hereto is presented to this Court since it is believed to involve an improper and erroneous failure and refusal to assume jurisdiction on the merits, which error can be effectively remedied only by an application to this Court for an interpretation of the statute relating to assigned judges and their powers, to wit, United States Code, Title 28, Sec. 22.

Your petitioners are presently incarcerated in the Federal Detention Headquarters, in New York City, and have been so incarcerated since February 5th, 1943, but have not yet elected to commence execution of their sentence, believing that such election would foreclose all right to probation, under the rule of *United States* v. *Murray*, 275 U. S. 347, 359, 72 L. Ed. 309.

In short, a situation is presented wherein two defendants are presently deprived of their liberty although the trial judge, respondent herein, is disposed to grant them probation on the merits but has ruled that he technically lacks jurisdiction to grant this relief.

The remedy by appeal is ineffective, first, because of a question of the appealability of the order (which is an order, in one aspect, denying reargument and intrinsically

declares itself to be a nullity); second, because of the delay incident to that procedure; and, finally, because of petitioners' inability to obtain a stay pending appellate review. The attendant circumstances are more fully detailed in the annexed petition and brief, which your petitioners respectfully request leave to file and which, by this reference, are made a part hereof for the purposes of this motion.

Dated New York, N. Y., March 6th, 1943.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioners.

Original Action No. .....

IN THE

Supreme Court of the United States

October Term, 1942

No. .....

MARTIN M. GOLDMAN and JACOB P. SHULMAN,
Petitioners,

against

SIDNEY C. MIZE, United States District Judge for the Southern District of Mississippi,
Respondent.

PETITION FOR WRIT OF MANDAMUS

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioners, Martin M. Goldman and Jacob P. Shulman, respectfully pray for a writ of mandamus directed to respondent, the Honorable Sidney C. Mize, United States District Judge for the Southern District of Mississippi, ordering and directing respondent to assume jurisdiction on the merits of an application made to him on January 25th, 1943, by your petitioners for a reargument, rehearing and reconsideration of his order and ruling made in New York on July 26th, 1940, then

denying their motion for a suspension of the execution of a sentence of imprisonment and for their admission to probation. The January, 1943, application was denied by respondent at Jackson, Mississippi, on or about January 26th, 1943, solely for lack of jurisdiction in respondent by reason of his absence from the Southern District of New York and the expiration of his designation for that District. The pertinent proceedings will hereinafter be more particularly described.

In support of said petition, your petitioners show:

I

On or about July 26th, 1940, your petitioners and one Theodore Goldman (a brother of petitioner Martin M. Goldman), all of them members of the bar of the State of New York, were convicted after plea of not guilty, in the United States District Court for the Southern District of New York, of the crime of conspiring, contrary to the provisions of United States Code, Title 18, Sec. 88, to commit an offense against the United States by attempting to obtain money for acting or forbearing to act in a bankruptcy proceeding in violation of United States Code, Title 11, Sec. 52(b). The trial consumed about ten days and was had before respondent, a judge of the United States District Court for the Southern District of Mississippi, sitting by assignment at that time in the Southern District of New York. Each of the defendants testified at length. The sentence of each defendant, which was imposed immediately upon the rendition of the verdict, was eighteen months imprisonment and a fine of $25.00, which was remitted. Respondent forthwith denied defendants' application to suspend the execution of the sentence and to admit them to probation. All the defendants were admitted to bail pending appeals thereafter taken to the Circuit Court of Appeals for the Second Circuit and to the Supreme Court of the United States.

II

The judgment of conviction was thereafter affirmed on appeal, finally by the Supreme Court of the United States (316 U. S. 129, 86 L. Ed. 1322), with Mr. Justice Murphy reading a dissenting opinion, the Chief Justice and Mr. Justice Frankfurter filing a dissenting memorandum and Mr. Justice Jackson not voting.

III

During and after the pendency of the proceedings in the Supreme Court of the United States, all three of the defendants made several applications to Judge Rifkind, in the Southern District of New York, to be admitted to probation, which applications were denied, with the exception that on or about October 23rd, 1942, the application was granted as to defendant Theodore Goldman only and denied as to your petitioners. Judge Rifkind, who had previously declared that petitioners made out "a good case for abbreviation of sentence," said further on the argument of the last application on October 20th, 1942, "I do not mind stating to you very frankly that the chief obstacle that I have had in overcoming in this case is that it was not tried before me, and that consequently I have not the feel of the facts which I would otherwise have * * * I thought that I might get some aid out of the correspondence with Judge Mize, but I received no aid from there in that direction." Thereafter, on or about December 21st, 1942, after respondent had stated in a letter that if the matter were before him then, he would grant probation as to petitioners, Judge Rifkind indicated that he would not entertain another application on petitioners' behalf. Solely on the basis of that refusal Judge Bright, of the Southern District of New York, denied a like application on December 31st, 1942, with the result that your petitioners at no time had an adjudication on

the merits which gave consideration to respondent's letter and favorable recommendation. Incidentally, Judge Rifkind's refusal to entertain a further application proceeded on the ground that respondent's recommendation was based mainly on events that had occurred since the trial.

IV

On or about January 13th, 1943, your petitioners obtained at Jackson, Mississippi, an order from respondent directing the United States Attorney for the Southern District of New York to show cause at Jackson, Mississippi, on January 25th, 1943, why your petitioners should not be granted a reargument, rehearing and reconsideration of respondent's original order denying their motion for a suspension of the execution of sentence and their admission to probation. A copy of this order to show cause and of the affidavit on which it was granted is hereto annexed and marked Exhibit A. The moving papers aforesaid were duly served on the said United States Attorney on January 18th, 1943. The United States Attorney filed no affidavit in opposition but merely communicated with respondent by letter in lieu of a brief.

V

On or about January 26th, 1943, respondent rendered an opinion, in the form of a letter, denying and dismissing the application for want of jurisdiction. A copy of this opinion is hereto annexed and marked Exhibit B. Simultaneously, respondent signed an order to like effect, which was filed in the office of the Clerk of the United States District Court for the Southern District of New York on or about January 29th, 1943. A copy of this order is hereto annexed and marked Exhibit C.

VI

On the following day, January 30th, 1943, your petitioners filed notice of appeal to the Circuit Court of Appeals for the Second Circuit, and on February 1st, 1943, applied to that Court for a stay pending the appeal. The application was denied off the bench (by Learned Hand, P. J., and Chase and Frank, JJ.), without prejudice to a renewal, provided your petitioners submitted to imprisonment in the meantime. On February 5th, 1943, your petitioners surrendered to the United States Marshal at New York and since that date have been continuously imprisoned. At present they are prisoners in the Federal Detention Headquarters in New York City. At no time, however, have they elected to enter upon the execution of their sentences. The motion for a stay was renewed in the Circuit Court of Appeals on February 8th, 1943. The Court (then consisting of Swann, Augustus Hand and Chase, JJ.) declined to refer the motion to the previous bench and summarily denied it.

VII

Thereafter, on due notice to the Solicitor General of the United States, your petitioners applied to the Chief Justice of the United States to be admitted to bail. On or about February 17th, 1943, the Chief Justice notified petitioners' counsel in writing that he would not grant bail, but that your petitioners were free to apply for mandamus if they were so advised.

VIII

There is filed herewith petitioners' brief in support of this petition, the burden of which is to the effect that respondent has full jurisdiction to pass upon the application on the merits.

Wherefore, your petitioners pray that there issue out of this Court a writ of mandamus directed to respondent ordering and directing respondent to make and enter an order determining on the merits the application for probation heretofore made to him by these petitioners in the action in the United States District Court for the Southern District of New York, entitled Criminal C-107-2, United States of America against Martin M. Goldman, Theodore Goldman and Jacob P. Shulman, Defendants, and granting to your petitioners such other and further relief as equity and justice require.

Dated, New York, N. Y., March 6th, 1943.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioners.

STATE OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:
CITY AND COUNTY OF NEW YORK

JACOB W. FRIEDMAN, being first duly sworn, deposes and says:

That he is an attorney-at-law duly admitted to practice before the Supreme Court of the United States of America, and has his office at 170 Broadway, New York, N. Y. That he is attorney for the petitioners herein. That for approximately two years prior to the date hereof he has been attorney for one of petitioners. That the facts in the above-entitled proceeding, and in the foregoing petition for

writ of mandamus, as well as in the motion filed herewith, are within the personal knowledge of affiant. That he has read the foregoing petition for writ of mandamus, motion for leave to file the same and exhibits thereto annexed and knows the contents thereof. That the same are true of his own knowledge, except as to matters which are therein stated on information and belief and as to those matters he believes them to be true. That affiant is personally familiar with the facts involved in this proceeding, as aforesaid, and is more familiar therewith than is either petitioner, and for that reason affiant makes this verification on petitioners' behalf.

JACOB W. FRIEDMAN

Subscribed and sworn to before me
this 6th day of March, 1943.

VIOLA FRIEDMAN
Commissioner of Deeds, City of N. Y.
N. Y. Co. Clk's No. 29, Reg. No. 12 F 3
Kings Co. Reg. No. 3005, Bx. Co. Reg. No. 43F16
Term Expires March 18, 1943

A copy of this petition, the motion for leave to file the same, the exhibits thereto annexed, and a copy of petitioners' brief in support of said petition and motion, all of which have been filed herein, have been duly served upon the Honorable Sidney C. Mize, United States District Judge for the Southern District of Mississippi, respondent herein.

Dated New York, N. Y., March 6, 1943.

JACOB W. FRIEDMAN,
Attorney for Petitioners.

"Exhibit A"

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

against

MARTIN M. GOLDMAN, THEODORE GOLDMAN and JACOB P. SHULMAN,

Defendants.

On reading the annexed affidavits of Martin M. Goldman and Jacob P. Shulman, duly sworn to the 11th day of January, 1943,

Let the United States Attorney for the Southern District of New York show cause before HONORABLE SIDNEY C. MIZE, United States District Judge, at the Federal Courthouse, Jackson, Mississippi, on the 25th day of January, 1943, at 10.30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made and entered herein granting the motion of defendants Martin M. Goldman and Jacob P. Shulman for a re-argument, re-hearing and reconsideration of the order and ruling of the HONORABLE SIDNEY C. MIZE, United States District Judge, made on July 26, 1940, denying their motion for a suspension of the execution of sentence and their admission to probation herein, why upon such re-argument, re-hearing and reconsideration their said motion should not be granted and why they should not have such other and further and different relief as to the Court may seem just and proper in the premises, and sufficient cause appearing therefor, pending

the hearing and determination of this motion and the entry of an order thereon,

Let the surrender of the said defendants be and the same hereby is stayed, and

Let service of a copy of this order and of the papers upon which it is granted, on the United States Attorney on or before January 18th, 1943 be deemed sufficient.

Dated, Jackson, Miss., January 13, 1943.

S. C. MIZE
United States District Judge.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA *against* MARTIN M. GOLDMAN, THEODORE GOLDMAN and JACOB P. SHULMAN, *Defendants.*	C 107-2 Filed January 13, 1943 at Jackson, Miss. S. C. MIZE U. S. D. Judge So. District of Miss.

STATE OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:
COUNTY OF NEW YORK

MARTIN M. GOLDMAN and JACOB P. SHULMAN, being severally duly sworn, depose and say:

We are two of the defendants in the above-entitled action, are familiar with the facts and submit this affi-

davit in support of our motion for reargument, rehearing and reconsideration of our application for probation which was denied by the Honorable Sidney C. Mize, United States District Judge, on July 26th, 1940.

A brief summary of the prior proceedings is as follows: The three defendants above-named were on July 26th, 1940, convicted of conspiracy to violate the Bankruptcy Act. The trial, which consumed about ten days, was had before Judge Mize and a jury. Upon rendition of the verdict each of the defendants was sentenced to eighteen months' imprisonment and $25 fine, which was remitted. Defendants applied to Judge Mize to suspend the execution of the jail sentence and to admit them to probation and the motion was denied. The judgment of conviction was thereafter affirmed on appeal, finally by the Supreme Court of the United States, with three Justices dissenting and one not participating (316 U. S. 129). Meanwhile the defendants made several applications to Judge Rifkind to be admitted to probation, which applications were denied, with the exception that on or about October 23d, 1942, the application was granted as to defendant Theodore Goldman only. Subsequently, on or about December 21st, 1942, after Judge Mize had stated in a letter that if the matter were before him then, he would grant probation as to the other two defendants, Judge Rifkind indicated within a few days that he would not entertain another application on their behalf. On the basis of this refusal Judge Bright denied a like application on December 31st, 1942, with the result that we have at no time had an adjudication on the merits which gave consideration to Judge Mize's letter and recommendation.

Judge Mize is fully familiar with the facts, circumstances and proceedings bearing upon this application.

No previous application for reargument, rehearing or reconsideration of the aforesaid ruling of Judge Mize has been made herein.

The reason why this motion is made by order to show cause is so that we may obtain a stay. Judge Bright's order has this day set surrender for January 13th, 1943, and all jurisdiction to grant probation terminates with surrender (United States *v.* Murray, 275 U. S. 347, 359). A stay is therefore vital to preserve the jurisdiction of the Court.

WHEREFORE, we respectfully ask for a reargument, rehearing and reconsideration of Judge Mize's aforesaid denial of probation; that upon such reargument, rehearing and reconsideration our motion be granted; and that we may have such other, further and different relief as may be just and necessary in the premises.

MARTIN M. GOLDMAN
JACOB P. SHULMAN

Sworn to before me this 11th day of January, 1943.

VIOLA FRIEDMAN
Commissioner of Deeds,
City of N. Y.
N. Y. Co. Clk's No. 29, Reg. No. 12F3
Kings Co. Reg. No. 3005, Bx. Co. Reg. No. 43F16
Term Expires March 18, 1943

"Exhibit B"

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

GULFPORT, MISSISSIPPI

Chambers of
SIDNEY C. MIZE
District Judge

Jackson, Mississippi
January 26, 1943

Honorable Jacob W. Friedman
170 Broadway
New York

Honorable Warren C. Fielding
New York

Honorable Matthew Correa
United States Attorney
New York

Re: United States of America
v.
Martin M. Goldman and
Jacob P. Schulman

Gentlemen:

I have considered carefully your argument and authorities upon the application of the above named defendants for a reconsideration of my decision denying them probation, made while sitting in New York, and have reached the conclusion that I am without jurisdiction to determine this matter. Section 22, Title 28, U. S. C. A., being the Act of March 3, 1911, Section 18 as amended, limits the power of an assigned judge to certain matters specifically men-

tioned in the statute after his return to his own district. He is granted specific authority to decide motions for new trials, settle bills of exceptions, certify narratives of testimony, or perform any other act required by law or the rules to be performed in order to prepare any case tried before him for review in the appellate court.

The above named defendants were tried before me, convicted, sentenced, and probation denied. That was the final judgment. The defendants appealed and their convictions were affirmed. So far as the district judge was concerned, the matter was finally closed, and I, being an assigned judge and having returned to my own district, have no jurisdiction whatever to determine any matter in that case. All matters that were submitted to me in New York have now been decided and were decided prior to the time I left the district. I, therefore, am foreclosed from exercising any other judgment in that case.

The case of Frad *v.* Kelly, 302 U. S. 312, is conclusive upon the above announcements. The court in that case construed the statute to the effect that an assigned judge had the power to perform the functions which are incidental and supplemental to the duties performed by him while present and acting in the designated district, but that the Act goes no further than that; that it does not contemplate that he shall decide any matter which has not been submitted to him within the designated district. The court further held in that case that a criminal trial is concluded by the judgment of sentence entered upon the verdict of guilty, and that while the statute gives him specific authority to hear a motion for a new trial, no authority is given him to hear a new matter, even though it arises in the same case.

An application for reconsideration of a motion for probation which was denied at the time is not a motion for a new trial, and regardless of what the application may be called, it presents new matter. For reasons appearing to the court at the time, the application was denied. The

defendants, after conviction, have been put to a large expense undoubtedly, and during the pendency of the appeal undoubtedly have suffered great humiliation and embarrassment, loss of profits from their profession, and probably if these matters were taken into consideration now, probation would be granted, but it would be upon grounds accruing since the trial terminated in the district court and would constitute new matter, which this court would have no jurisdiction to consider. For this reason the petition will be denied and dismissed.

I am signing an order today and forwarding it to the Clerk of the District Court in New York to be recorded together with the original of this letter, which will be filed with the Clerk and will constitute my opinion upon the question.

Sincerely yours,

S. C. Mize
S. C. Mize
District Judge

"Exhibit C"

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

MARTIN M. GOLDMAN and
JACOB P. SCHULMAN

Application having been presented to the undersigned district judge, now sitting in Mississippi, for a reconsideration of the application made by the defendants for probation, which had been denied at the time of the conviction of the defendants by the undersigned judge, sitting by assignment in the Southern District of New York, and said application now having been fully considered, it is ordered by the undersigned judge that said application and petition be, and it hereby is, denied for lack of jurisdiction in the undersigned judge; and it is further ordered that the order heretofore made on the 14th day of January, 1943, staying the execution of sentence upon the above named two defendants be and the same hereby is set aside and canceled because of lack of jurisdiction in the undersigned judge to have made same. To all of which action the defendants are granted an exception.

ORDERED, this the 26th day of January, 1943, at Jackson, Mississippi.

SIDNEY C. MIZE
United States District Judge
Southern District of Mississippi

IN THE

Supreme Court of the United States

October Term, 1942

No. .....

MARTIN M. GOLDMAN and JACOB P. SHULMAN,
Petitioners,

against

SIDNEY C. MIZE, United States District Judge for the Southern District of Mississippi,
Respondent.

PETITIONERS' BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND IN SUPPORT OF SAID PETITION

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioners have filed in this Court the following:

1. Motion for leave to file petition for writ of mandamus.

2. Petition for writ of mandamus, with exhibits thereto annexed.

3. This brief.

The single question presented by this petition relates to the jurisdiction of respondent as a District Judge who, while sitting by assignment in another district, presided on the trial of and sentenced petitioners, to determine on the merits, after the expiration of his assignment and his return to his home district, an application for reargument, rehearing and reconsideration of his original denial of probation.

Jurisdiction

The jurisdiction of this Court is invoked under United States Code, Title 28, Sec. 342 (Judicial Code, Sec. 234), as construed in *Los Angeles Brush Mfg. Corp.* v. *James,* 272 U. S. 701, 71 L. Ed. 481, where the Court wrote, by Mr. Chief Justice TAFT:

> "In *Virginia* v. *Rives,* 100 U. S. 313, 323, 25 L. Ed. 667, 671, Mr. Justice Strong, speaking for the court in reference to writs of mandamus which the Supreme Court might issue, said:
>
> " 'In what case such a writ is warranted by the principles and usages of law it is not always easy to determine. Its use has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do.' "

It is further established that mandamus is issued on the application of a party who has a clear right but no adequate remedy. *Ex parte Cutting,* 94 U. S. 14, 24 L. Ed. 49. It is available though the aggrieved party might also be entitled to appeal. *In re Winn,* 213 U. S. 458, 53 L. Ed. 873. Mandamus lies to compel the lower court to take jurisdiction. *Chicago & A. R. Co.* v. *Wiswall,* 23 Wall. (90 U. S.) 507, 23 L. Ed. 103; *Ex parte Schollen-*

berger, 96 U. S. 369, 24 L. Ed. 853; *In re Pennsylvania Co.*, 137 U. S. 451, 34 L. Ed. 738; *In re Hohorst*, 150 U. S. 653, 37 L. Ed. 1211. If the lower court erroneously declines to take jurisdiction, mandamus lies to compel it to proceed to a determination. *In re Grossmayer*, 177 U. S. 48, 44 L. Ed. 665. "Repeated decisions of this court have established the rule that this court has power to issue a mandamus, in the exercise of its appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause." *McClellan* v. *Carland*, 217 U. S. 268, 54 L. Ed. 762.

The Issue

The precise issue presented by the motion and the petition herein is this:

Where a district judge of the United States has been assigned to another district, there presides at a criminal trial and imposes sentence on a defendant, whom he thereupon declines to admit to probation, may that judge, after the expiration of his assignment and his return to his home district, determine an application by the defendant for reargument, rehearing and reconsideration of the original denial of probation?

ARGUMENT

I

The statute as to powers of assigned judges (United States Code, Title 28, Sec. 22), prior to its recent amendment, read, so far as pertinent, as follows (and this language continues unchanged):

> "Any designated and assigned judge who has held court in another district than his own shall have the

> power, notwithstanding his absence from such district and the expiration of the time limit in his designation, to decide all matters which have been submitted to him within such district, to decide motions for new trials, settle bills of exceptions, certify or authenticate narratives of testimony, or perform any other act required by law or the rules to be performed in order to prepare any case so tried by him for review in an appellate court; and his action thereon, in writing filed with the clerk of the court where the trial or hearing was had, shall be as valid as if such action had been taken by him within that district and within the period of his designation."

A leading and frequently cited (and invariably approved) case is *United States* v. *Goldstein* (C. C. A. 8) 271 F. 838. There a Federal district judge, who heard a cause and entered a judgment while sitting by assignment in another district, was held to have the power three years and three months thereafter to hear and determine a motion for modification of such decree while he was sitting in his own district, and the modified decree thus rendered was held to be valid and effective. In that case, the original decree adjudged and found defendant Goldstein guilty of the commission of fraud, perjury and deceit. This was modified so that the defendant was exonerated from having knowingly testified falsely as recited in the original decree. That holding, as a study of the case indicates, goes far beyond the mere reconsideration and reargument sought herein.

The fact that the statute goes so far as explicitly to specify the power "to decide motions for new trials" evidences a plain legislative intent to permit reargument of a motion made at the trial. In view of the general principle that a motion for reargument is regularly and necessarily heard by the same judge as decided the original motion, it is hard to conceive that Congress did not intend to embrace the present situation within the language "to

decide all matters which have been submitted to him within such district." Since a motion for a new trial would seem to go beyond less important motions (as for reargument), it was quite manifestly deemed unnecessary to specify such motions expressly.

II

Respondent's opinion cited only the holding in *Frad* v. *Kelly*, 302 U. S. 312, 82 L. Ed. 282, and he appeared to consider that case as conclusive that he lacked the requisite power. However, that case holds the following and nothing more:

> "An application for the termination of the probation and the proceedings against a defendant constitutes a new matter, submission of which may not be made to the assigned judge after his return to his own district."

The Court plainly declares that only the local judge can "supervise, extend, modify or terminate the probation," but it is noteworthy that the verb "grant" is omitted from the foregoing enumeration on page 318 of the opinion. The radically disparate character of a proceeding to terminate probation and the need for an independent inquiry on that subject are thoroughly explained in *Escoe* v. *Zerbst*, 295 U. S. 490, 79 L. Ed. 1566.

The one time limitation on the power of the trial judge to admit to probation pursuant to the broad remedial provisions of the Federal Probation Act (United States Code, Title 18, Sec. 724), is that the grant of probation must be made before the actual commencement of the execution of the sentence. This is the rule of *United States* v. *Murray*, 275 U. S. 347, 359, which, incidentally, cites as consistent with its ruling, the holding in *Ackerson* v. *United States* (C. C. A. 2), 15 F. 2d 268, wherein successive applications for probation by the same defendant are held to be proper.

III

From the standpoint of familiarity with the facts and with the propriety of probation as affecting particular defendants, there can be little doubt that, *ceteris paribus*, the trial judge is best qualified to pass on the application. To illustrate, the trial of the instant case consumed some ten days and each of the petitioners testified at length. The present determination of an application to be admitted to probation depends upon the consideration of composite factors: the evidence brought out on the trial, factors of innocence or relative culpability, the type of men the petitioners were shown to be (in short, every element bearing upon the appropriate sentence) plus events occurring since the trial, such as changes in the circumstances of the petitioners, the military status of themselves or their children, the deprivation of their law practice by the conviction, the humiliation and other punishment they have already suffered (in other words, the recognition that the theory of the probation law, as outlined in *United States* v. *Murray*, 275 U. S. 347, 72 L. Ed. 309, rests upon the existence of a *locus poenitentiae* between conviction and imprisonment). Any attempt to segregate the two sets of factors, or to give the trial judge jurisdiction when the motion is based on events before sentence and to deprive him thereof when subsequent considerations are adduced, will involve the courts in impractical niceties of dialectics and tend towards an inequitable administration of the probation statute. Indeed, it must be appreciated that the variety of reasons underlying the desirability of probation is such and they are so interrelated that no good purpose could possibly be served by directing their differentiation.

IV

On December 29th, 1942, the statute relating to assigned judges (United States Code, Title 28, Sec. 22) was amended so as to permit the assignment to other circuits of judges of circuit courts of appeals. While this does not directly involve respondent or the question now being argued, the language of the amendment and the tenor of the committee discussions are such as to shed much light on the issue.

The amendment, *inter alia*, adds the following sentence *immediately following* the sentence (relating to district judges) quoted at pages 21-22 of this brief:

> "Likewise, any designated or assigned circuit judge who has served temporarily in a circuit court of appeals other than his own shall have the power, notwithstanding his absence from such circuit or the expiration of the time limit in his designation, to join as an associate circuit judge in the decision and final disposition of all matters submitted to him and his associate judges in such circuit court of appeals, and to join in the consideration and disposition of any petition for rehearing, or any motions, petitions, or further proceedings in respect of any submitted cause in the decision and disposition of which he has participated."

Thus the amendment dealing with circuit judges gives them plenary power, notwithstanding their absence from the visited circuit and the expiration of the time limit in their designation, to join in petitions for rehearings or any motions, petitions or further proceedings in respect of any submitted cause in the decision of which they have participated. To be sure, if like language were employed in the preceding sentence dealing with district judges, there

would be little doubt that this would constitute a precise enactment in favor of the exercise by respondent of his power. Despite the difference in language, it seems reasonably clear that the identical result is intended, as we shall attempt to show.

The amendment quoted above immediately follows the sentence dealing with district judges and begins with the word "Likewise." This indicates a legislative intent to establish a uniform rule with regard to circuit judges and district judges.

The reason why, in dealing with circuit judges, Congress explicitly mentioned rehearings and further proceedings was simply this: even in the absence of a quondam assigned circuit judge, the two remaining members of any circuit court of appeals would constitute a quorum and would be able to perform judicial acts. Therefore, in order to make it abundantly clear that the third judge is authorized to participate in applications for rehearing or further proceedings, the statute so declares *in haec verba*. With regard to a district judge, who himself constitutes a court, no such declaration appears necessary.

In order to clarify the Congressional intent, we respectfully refer the Court to the official report of the only hearing on the subject, described as "Hearing before a subcommittee of the Committee on the Judiciary, United States Senate, 77th Congress, Second Session, on S. 2655, a Bill to amend the Judicial Code to authorize the Chief Justice of the United States to assign circuit judges to temporary duty in circuits other than their own, July 30, 1942." The first witness to testify before the subcommittee was Mr. Chief Justice GRONER of the Court of Appeals of the District of Columbia, who said (pp. 3, 4):

> "The bill has a single purpose, and that purpose can be stated shortly to be to apply the present law in relation to the transfer of judges of the United States district courts in the case of judges of the United States circuit courts. * * *

"But now getting back to my main thesis, the purpose of the present bill is to apply that provision of law as it relates to district judges to the case of circuit judges. * * *"

He then proceeded to discuss the action taken by the judicial conference, thus (p. 4):

"The matter is not one of first impression. It has been under consideration—its practicability, its feasibility, its workability, and all the various aspects which might be properly considered, have been thought over, and at the last meeting of the judicial conference of senior circuit judges, which is required by law to meet annually in the city of Washington under the presidency of the Chief Justice of the United States, at that conference the matter was thoroughly discussed and a resolution adopted, which is included in the report of the Chief Justice of the September session 1941, of the judicial conference, and which reads as follows:

"'The conference resolved that legislation was desirable authorizing the Chief Justice to assign circuit judges to temporary duty in circuits other than their own, the procedure of assignment to conform to that of existing legislation relating to the assignment of district judges to districts outside their circuits.'"

Senator Danaher, the Chairman, read into the record the annotated draft of the bill as prepared by a distinguished committee of the American Bar Association (pp. 5-8), in which annotations the committee says with regard to the old law dealing with district judges:

"Subsection (c) is the third paragraph of 28 U. S. C. A. 22 verbatim. It is limited in application to district judges and district courts. The same subject

matter insofar as circuit judges are concerned is covered by proposed subsection (d)."

And as to the latter subsection, it says:

"Subsection (d) is new. It is designed to cover in the case of a temporarily assigned circuit judge the subject matter of subsection (c) which applies only to district judges."

Mr. Chief Justice GRONER also read into the record (pp. 8-9) the explanatory statement submitted by the Bar Association committee on jurisprudence and law reform, wherein the following declaration appears:

"It is attempted in the proposed bill to extend and apply to the circuit courts, with no change, the existing provisions of the code relative to district courts.

"In the interest of avoiding unnecessary judicial interpretation, and in the interest of retaining the benefit of the body of judicial opinion which has grown up under the present provisions respecting district courts, the proposed bill leaves them untouched, and merely adopts for circuit courts the present wording of the district court provisions. This was the recommendation of the judicial conference."

We shall not unduly protract this brief by further quotation from this hearing report, but it appears elsewhere therein (*e. g.*, pp. 9, 11, 14-15, 16) on eminent authority that the purpose of the amendment was absolutely to assimilate the practice already existing as to district judges to the new case of circuit judges.

CONCLUSION

In the light of the foregoing, it is respectfully urged that respondent was in error in declining to assume jurisdiction of the application.

Wherefore, your petitioners pray that this Court issue a writ of mandamus directed to respondent, ordering him to take plenary jurisdiction in the premises.

Dated New York, N. Y., March 6th, 1943.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioners.